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Presidential Privileges Versus History

The White House is on the Wrong Side of History

July is the month when Americans are most likely to reflect on the immortal words of the Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal. . . ."

Yet, when Americans pick up their morning newspapers and read about the stalling tactics of the Clinton Administration, they may be reminded of a somewhat different maxim:

"All animals are equal, but some animals are more equal than others."

The Clinton White House is refusing to comply with the evidentiary rules that apply to everyone else. It refuses to turn over information that has been subpoenaed in criminal investigations, and it pleads with the courts for special treatment. The courts, however, have not been sympathetic. **The White House has lost every one of its cases:**

- **The Clinton Administration lost the Hillary Clinton case in April 1997** (part of the Whitewater investigation - it also dealt with records from the late Vince Foster's office and records from Mrs. Clinton's former law firm that miraculously appeared in the residence area of the White House).
- **It lost the Mike Espy case in June 1997** (part of an investigation by Independent Counsel Donald Smaltz into whether former Secretary of Agriculture Espy illegally accepted gifts).
- **It lost the Secret Service case in May 1998 and again in July** (reportedly part of the investigation into whether any person lied under oath or encouraged another to do so in the Monica Lewinsky matter).
- **And, it lost the Bruce Lindsay/Sidney Blumenthal case in May 1998** (also reported to be related to the Lewinsky matter).

In denying the pleas of the White House, the courts have issued learned opinions. However, many powerful arguments appear in other places. We quote below from two United States Senators, an academic, and the exceptional James Madison. **When the White House pleads for special privileges, it puts itself in opposition to the law and to the kinds of moral, political, jurisprudential, and philosophical views that these gentlemen have expressed.**

Senator Ted Kennedy said: ". . . Government secrecy breeds Government deceit, . . . executive privilege nurtures executive arrogance, . . . national security is frequently the cover for political embarrassment, and . . . the best antidote to official malfeasance, misfeasance, and

nonfeasance is the sunshine and fresh air of full public disclosure of official activities. . . . If [high officials in the government] don't think their activities can withstand public and congressional scrutiny, then maybe there is something wrong with the activities, not the scrutiny." [Source: *Freedom of Information; Executive Privilege; Secrecy in Government*, Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, United States Senate, 93d Cong., 1st Sess., Vol. 2, p. 209 (April 10, 11, 12; May 8, 9, 16; June 7, 8, 11, 26, 1973) (in 3 vols.) (the Senator was speaking, not surprisingly, of Watergate, not Whitewater).]

James Madison said: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [Source: Letter of James Madison to W.T. Barry (Aug. 4, 1822), in Gaillard Hunt (ed.), 9 JAMES MADISON'S WRITINGS 103 (1910) (Mr. Madison was writing on the subject of education).]

Scholar David Frohnmayer said: "A legislative body deprived of information in the conduct of public affairs is impotent to act in the national interest. The judicial process becomes a mockery unless it has the capacity to determine the truth in controversies between parties. Any legal doctrine that denies information to legislatures or courts threatens the essence and independence of these institutions and must therefore be justified, if it can be justified at all, only by the most compelling considerations of law and policy. The stakes in the long-standing debate on . . . executive privilege could not be higher." [Source: David B. Frohnmayer, "An Essay on Executive Privilege" in *Essays on Executive Privilege* 1 (1974) (a pamphlet of the American Bar Foundation).]

Senator Sam Ervin said: "[E]xecutive privilege permits the President to keep secret confidential communications between him and his aides and even confidential communications among his aides which are had for the purpose of aiding the President to perform in a lawful manner his official duties.

"Further than this, executive privilege does not go. Since the official duties of the President as defined by the Constitution and the laws do not encompass illegal or unethical or political activities, executive privilege does not confer upon the President the arbitrary power to withhold information, papers, or taped recordings, which are relevant to alleged crimes being investigated by a grand jury or undergoing trial before court, or which are relevant to illegal, unethical, or political activities being investigated by an authorized congressional committee." [Source: Sam J. Ervin, Jr., *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 34-35 (1980, reprinting a statement first made in 1973) (Senator Ervin was Chairman of the Senate "Watergate Committee").]

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The second quotation is from George Orwell's *ANIMAL FARM*, chap. 10 (1946).